



October 26, 1999

Ms. Marianna M. McGowan
Bracewell & Patterson, L.L.P.
Lincoln Plaza
500 N. Akard Street, Suite 4000
Dallas, Texas 75201-3387

OR99-3025

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 128555.

The Hurst-Euleless-Bedford Independent School District (the "school district") received a request for four categories of information. You object to the release of only one category of information, attorney fee bills. You claim that portions of the requested fee bills are excepted from disclosure under sections 552.101,¹ 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You contend that some of the information at issue relates to the school district's defense of litigation and is, therefore, excepted from disclosure under section 552.103. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

¹We note that section 552.101 does not encompass discovery privileges. Open Records Decision No. 575 (1990).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You also contend that the information relating to litigation is protected as attorney work product. A governmental body may withhold attorney work product from disclosure under sections 552.103 and 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney’s mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. ORD 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney’s mental processes, conclusions and legal theories. *Id.*

Your letter to this office references “litigation,” and the submitted fee bills reference an “OCR complaint” and a “due process hearing.” You have not, however, established that the “litigation” to which you refer is the type of proceeding considered to be litigation under the Public Information Act. *See, e.g.,* Open Records Decision No. 588 (1991) (contested case under the Administrative Procedure Act is litigation for purposes of section 552.103). You also have not sufficiently explained the circumstances which lead you to believe that the

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

school district reasonably anticipates litigation involving the requestor. For these reasons, we conclude that the information at issue is not excepted from disclosure under section 552.103 or the work product aspect of section 552.111.

Finally, you contend that the information at issue is protected by the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. ORD 574 at 5. Section 552.107(1) does not except purely factual information from disclosure, nor does it protect information gathered by an attorney as a fact-finder. Open Records Decision Nos. 574 (1990), 559 (1990), 462 (1987). Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memoranda sent. ORD 574 at 5. We have marked the information that is protected by section 552.107. Except for the information discussed below, you must release the remaining information to the requestors because you have not shown that the remaining information is an attorney's legal advice or constitutes confidential client communications.

The fee bills contain references to several students. The students' identities are excepted from disclosure under sections 552.026 and 552.114 of the Government Code. In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. "Education records" under FERPA are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

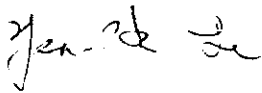
20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986).

In this instance, you have submitted to this office legal bills containing students' names. The legal bills are education records under FERPA. Prior to releasing the legal bills to the

requestors, FERPA requires the school district to delete information from the fee bills to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). This identifying information is deemed confidential under FERPA and must be withheld from disclosure. However, parents have a right to inspect the education records of their children. 20 U.S.C. § 1232g(a)(1)(A); *see* Open Records Decision No. 431 (1985) (Public Information Act's exceptions to required public disclosure do not authorize withholding of "education records" from adult student). Thus, you must release information identifying the requestors' child to them, but you must withhold information that identifies any other students.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/ljp

Ref: ID# 128555

Encl. Marked documents

cc: Mr. Erich Strasburger
Ms. Anne Strasburger
3225 Ashland Street
Bedford, Texas 76021
(w/o enclosures)